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No. 87-872

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE TIMES-PICAYUNE PUBLISHING CORPORATION, *et al.*,
Petitioners

v.

EDWIN W. EDWARDS, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF OF PETITIONERS

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TABLE OF CONTENTS

	Page
ARGUMENT	1
CONCLUSION	10

TABLE OF AUTHORITIES

CASES:

Detroit Free Press v. Recorder's Court Judge, 14 Med. L. Rptr. 2044 (Mich. App., December 10, 1987)	7
Gannett Co. v. De Pasquale, 443 U.S. 368 (1979)	8
Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982)	2, 3, 7
In re Reporters Committee for Freedom of the Press, 773 F.2d 1325 (D.C. Cir. 1985)	7
Press-Enterprise Co. v. Superior Court, 478 U.S. ——, 92 L. Ed. 2d 1, 106 S. Ct. 2735 (1986)	8
Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)	2, 7
United States v. Crisona, 416 F.2d 107 (2d Cir. 1969)	7
United States v. Jones, 542 F.2d 186 (4th Cir. 1976), *cert. den.*, 426 U.S. 922 (1976)	7
United States v. Musto, 540 F. Supp. 318 (D.N.J. 1982)	7

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The petitioners submit this reply brief in support of their petition for a writ of certiorari. Although the respondents seek to minimize the importance of the decision below, their opposition memorandum focuses the broad implications of that decision and underscores the necessity for full review by this Court.

ARGUMENT

1. Like the Court of Appeals, the respondents seek to remove the issue presented here from the reach of this Court's prior access decisions. The respondents do so by recasting the two lengthy mid-trial proceedings at issue, which were prompted by reports of attempts to bribe a juror, as ordinary bench conferences. Thus, the respondents frame their counterstatement of the question as whether "the First Amendment prohibits a *trial judge* in the midst of a highly publicized criminal proceeding

from interviewing jurors in chambers. . . ." In fact, these "interviews" were on the record examinations of both jurors and non-juror witnesses; the "interviews" were conducted not only by the "judge" but also by counsel; during these "interviews" motions to excuse jurors were made and argued by counsel; and rulings on these "interviews" were made and the reasons for those rulings stated by the District Court. Each of the proceedings lasted over two hours.[1]

Taking their cue from the Court of Appeals, the respondents seek to fit the multi-faceted proceedings at issue here, which included testimony, motions, and rulings, within *dicta* in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (Brennan, J., concurring opinion) and *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n. 25 (1982), suggesting that sidebar "huddles" and similar routine *in camera* conferences are not subject to public access rights. There is, however, no hint in those brief *dicta* that the "bench conference" rubric extends to testimonial and adjudicative mid-trial proceedings, hours in duration, which go to the impartiality and fairness of the jury in a criminal trial. Far from supporting denial of certiorari, the elastic interpretation of the "bench conference" exception by the Court of Appeals (App. 8a-10a) itself presents an issue worthy of full review by this Court.

2. The Court of Appeals held that all mid-trial juror proceedings fall outside the constitutional presumption of openness. In support of this categorical conclusion, the Court of Appeals relied principally upon the prognostication that the public examination of impanelled jurors invariably leads to conflict and intimidation, while

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[1] Throughout their opposition, the respondents belittle the proceedings as "conference[s] concerning a juror" (Opposition, pp. 4, 7); "that morning's conference" (Opposition, p. 9); "juror interviews" (Opposition, p. 18 n.6); and "in-chamber inquiries" (Opposition, p. 21).

the same procedure conducted behind closed doors would not. (App. 11a-12a). This pronouncement is manifestly speculative. It is also directly contrary to this Court's conclusion that public presence tends to improve, not undermine, the quality of testimony. *Globe, supra,* 457 U.S. at 610 n. 26.

Categorical closure flies in the face of *Globe*'s common sense teaching that a trial court must weigh on a case-by-case basis even those compelling interests supporting closure in order to assure that closure will not be ordered unless it is both necessary and carefully circumscribed. "[A] mandatory rule, *requiring no particularized determinations in individual cases,* is unconstitutional." *Globe, supra,* 457 U.S. at 611 n.27 (emphasis added). The First Amendment does not allow a generalized rule of courtroom closure when "it is clear that the circumstances of the particular case may affect the significance of the interest [assertedly justifying closure]." *Globe, supra,* 457 U.S. at 608.[2]

The respondents make no effort to justify the categorical analysis of the Court of Appeals as conducive to proper determination of closure requests in specific cases. Rather, the respondents point to one footnote in the Court of Appeals opinion which purports to leave open the possibility that some future probe of suspected juror misconduct might be conducted in public. (Opposition, pp. 23-24, quoting App. 13a, n.5). Because "the need for private questioning of the jurors in this case was so ob-

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[2] In the context of mid-trial juror proceedings, the propriety of closure may depend upon such varying facts as whether the incident being investigated involves threats to a juror, illness of a juror, exposure to prejudicial publicity, juror misconduct, or outright attempts to bribe a juror; the nature and stage of the trial itself; the jurors' own expressions of discomfort or lack thereof; the anticipated length and structure of the inquiry to be conducted; the positions of prosecution and defense on the necessity for closure; and myriad other specific facts that inform any proper reconciliation of First Amendment interests and competing concerns.

vious, and the 'practical difficulties of holding a hearing' were so apparent," the respondents say, the Court of Appeals did not make any categorical pronouncement about closure of all mid-trial juror proceedings.

The single footnote upon which the respondents rely is, however, no match for the facts of the case. In this case, the interests in open proceedings were so compelling (informing the public about allegations of possible jury bribery in the criminal trial of an incumbent governor for acts of alleged public corruption); the interests in total closure so speculative (the jury was sequestered, the parties freely discussed all other aspects of the case, and the District Court found that there was only a "possibility, however slight" that the specifics of the closed proceedings would reach the sequestered jury); and the interest and availability of persons opposing closure so apparent (petitioners and their counsel were available immediately to address closure, and there is nothing in the record to support the Court of Appeals' assertion that "practical difficulties" precluded a pre-closure hearing) that the Fifth Circuit decision inevitably will be read as permitting closure of mid-trial juror proceedings without a pre-closure hearing in the unbridled discretion of the trial court.

The cited footnote, moreover, must be read against the Court of Appeals' statement of its own holding.[3] Unquestionably, that holding has the effect of removing *all* mid-trial juror proceedings from the procedural and substantive criteria for courtroom closure established by this Court's prior decisions. While the Court of Appeals' footnote theoretically may leave open the "possibility" that the First Amendment may preclude closure of juror proceedings on other facts, if the decision below stands

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[3] "Thus, for first amendment purposes, no presumption of openness attaches to proceedings involving the mid-trial questioning of jurors. It follows that the trial judge did not err in failing to provide a preclosure hearing." (App. 12a-13a).

that "possibility" will be addressed only within the framework of the Court of Appeals' holding that no presumption of openness attaches to juror proceedings and no prior opportunity to be heard need be extended to opponents of closure. The holding leaves trial judges free to close juror proceedings at will and plainly permits, if it does not require, closure of every such proceeding.

Accordingly, it is apparent that if the Court of Appeals were to address the propriety of closing juror proceedings in another case, it would evaluate closure only within a procedural and substantive constitutional framework radically different from that of *Richmond Newspapers*, *Globe*, and their progeny. The decision below squarely rejects the established constitutional framework of closure adjudication and applies a new, loosely discretionary closure regime—unknown to any prior decision of this Court—to *all* mid-trial juror proceedings. If not a categorical mandate for closure, this regime surely embodies a forthright rejection of the standards of adjudication articulated at length by this Court in its prior access cases. It merits full review by this Court.

3. Contrary to the respondents' contentions (Opposition, p. 18), this case squarely presents the issue whether the First Amendment permits a trial court to close mid-trial proceedings to inquire into possible bribery of the jury without affording those opposing closure an opportunity to be heard. The Court of Appeals expressly held that "for first amendment purposes, no presumption of openness attaches to proceedings involving the mid-trial questioning of jurors." The Court then added, unmistakably:

> It follows that the trial judge did not err in failing to provide a preclosure hearing.

(App. 12a-13a). The Court of Appeals reiterated the point in an accompanying footnote:

> In these circumstances, there is no need for the court to halt the proceedings to provide a midcourse discussion of reasonable alternatives to closure.

(App. 13a, n.5). There is, then, no basis for the respondents' suggestion that the Court of Appeals disposed of the case without confronting the issue of the petitioners' right to be heard in opposition to closure. Logically, the Court of Appeals could not, in any event, have affirmed the speculative "findings" supporting the District Court's closure orders without disposing of the petitioners' central contention that those "findings" had been reached without constitutionally required input from the petitioners.

4. As discussed at length in the Petition, pp. 15-17, the decision of the Court of Appeals converts this Court's functional test for determining whether there is a First Amendment right of access to a particular proceeding into a generalized balancing test for determining if entire categories of trial proceedings proceed more efficiently when open or closed. The decision below seriously misconstrues the functional test by weighing against the positive values of openness,[4] the proper functional standard identified by seven other circuits, inherently speculative and supposedly negative concerns about the impact of public access on the proceedings at issue (App. 11a-13a). Significantly, the respondents make no effort to justify this misconstruction of the functional access test, nor to reconcile the Fifth Circuit's novel balancing version of the functional test with that adopted in the First, Second, Third, Fourth, Sixth, Ninth, and Eleventh Circuits.

Instead, the respondents seek to avoid the functional test altogether. They contend that there is no historical

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[4] Whether "public access . . . would tend to operate as a curb on prosecutorial or judicial misconduct and would further the public's interest in understanding the criminal justice system." Petition, pp. 15-16, n.10.

tradition of public access to juror proceedings[5] and cite the view of then Judge Scalia that a historical record of openness is "obviously necessary" to a determination of constitutional access. Opposition, p. 17, *citing In re Reporters Committee for Freedom of the Press*, 773 F.2d 1325, 1332 (D.C. Cir. 1985). Although this Court considers both historical and functional factors in determining whether a presumption of openness applies, and a clear majority of this Court have concluded that a history of public access is helpful because "a tradition of accessibility implies a favorable judgment of experience," *Globe*, 457 U.S. at 605, *quoting Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring in judgment); *Richmond Newspapers*, 448 U.S. at 582-584 (Stevens, J., concurring), the Court has never held that a histori-

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[5] Despite the Fifth Circuit's unsupported assertion to the same effect, there is evidence indicating that juror inquiries historically have been open. *See* Petition, pp. 14-15. The handful of cases cited by respondents as illustrative of a tradition of closure arise under circumstances in which a defendant has failed to object to the conduct of proceedings in chambers and the Court has found that the defendant waived his right to object. *See, e.g., United States v. Crisona*, 416 F.2d 107 (2d Cir. 1969) (No indication in record that defense counsel requested hearing in open court or objected to proceedings in chambers. Thus, the Court found no merit to defendant's argument.); *United States v. Jones*, 542 F.2d 186 (4th Cir. 1976), *cert. den.*, 426 U.S. 922 (1976) (Defendants cannot be heard to complain on appeal about *ex parte* questioning of juror by judge in chambers where Court merely adopted a procedure suggested by counsel for defendants.); *United States v. Musto*, 540 F. Supp. 318 (D.N.J. 1982) (Defendants waived right to object to *ex parte* questioning of juror by judge where counsel failed to object to procedure and, in fact, had approved of the procedure). Other cases indicate that juror inquiries are frequently conducted in open court (Petition, p. 14 n.8); and the only case besides the present one which, to our knowledge, addresses the First Amendment issue of access to juror proceedings recently recognized a constitutional right of access to such proceedings. *Detroit Free Press v. Recorder's Court Judge*, 14 Med. L. Rptr. 2044 (Mich. App., December 10, 1987).

cal record of openness is necessary before the First Amendment right of access attaches to proceedings. Thus even if the historical evidence did not support open juror proceeding, the Court of Appeals' misuse of the functional test as a vehicle for categorical closure analysis cannot be sidestepped or ignored.

5. The respondents suggest that this case is "peculiarly" unsuited for the granting of certiorari because the case does not have broad application. Yet the respondents themselves acknowledge that "judges are frequently presented with reports" of potential juror misconduct. (Opposition, p. 15). Moreover, both the Petition and the Opposition cite numerous decisions involving mid-trial inquiries concerning the jury.

Similarly, this Court should pay little heed to the respondents' suggestion that review is unwarranted because the Court cannot award meaningful relief to the petitioners. This suggestion is but a disguised argument that an access case is mooted by the unimpeded conclusion of secret proceedings, an argument repudiated long ago by this Court in the specific context of access issues. *See, e.g., Press-Enterprise Co. v. Superior Court*, 478 U.S. ——, 92 L.Ed.2d 1, 9, 106 S. Ct. 2735 (1986); *Globe, supra*, 457 U.S. at 603; *Gannett Co. v. De Pasquale*, 443 U.S. 368, 377-378 (1979).

In addition, to this day the petitioners are being deprived of access to material portions of the closed proceedings. Without any justification but a cursory footnote, (App. 19a, n. 8), the Court of Appeals affirmed the *permanent* sealing of portions of the District Court record that would include comments of the Court and the parties on the issue of closure. Thus the petitioners have been forced to present their case in the Court of Appeals and in this Court, to date, without access to critical portions of the contemporaneous record. The petitioners vigorously seek disclosure of that portion of the sealed record.

6. Finally, the respondents assert that the case is not worthy of review because the District Court apprised the public of the nature of the closed proceedings "*to the extent necessary*" (Opposition, p. 8), was "at every stage sensitive to the interests of the news media" (Opposition, p. 26), and "[a]t the close of trial . . . released transcripts with only minor redactions." In fact, however, the District Court's orders greatly minimized the seriousness of the proceedings and gave no hint that the proceedings revolved around possible attempts to corrupt the jury.[6] Further, the District Court did not release the transcript of the proceedings "at the close of trial," but some three weeks after the conclusion of the trial and some six weeks after the conduct of the closed proceedings, by which time the closed proceedings had long since crossed the line from news to history.

In the end, it is not the District Court's intentions or its sensitivity that are at issue here, but rather its summary closure of two critical mid-trial proceedings during Governor Edwards' trial, without affording the waiting petitioners or their nearby counsel even a moment's opportunity to be heard. However well intended, those arbitrary closure orders directly conflict with *Globe* and related precedents of this Court. They should have been set aside swiftly by the Court of Appeals, but were instead affirmed in a decision that undermines established procedural and substantive guarantees of public access to criminal trials.

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[6] The orders blandly described the nature of the incidents that triggered the proceedings as a report that two jurors had discussed "some aspect of the previous trial" and a report that a juror "commented about the actions of one of the defendants in the courtroom." (App. 22a, 24a)

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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